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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 17

WALTER HUMPHREY, ETC., ET AL., *Petitioners*

v.

C. W. MOORE, ETC., ET AL., General Drivers, Warehousemen and Helpers, Local Union No. 89, and Dealers Transport Company, *Respondents*

On a Writ of Certiorari to the Court of Appeals of the State of Kentucky

REPLY BRIEF FOR PETITIONERS

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I.

Playing hide and seek with its professed "neutrality," respondent Dealers belatedly challenges the authority of the Joint Conference Committee on two grounds: (1) the Committee did not negotiate the con-

tract and therefore lacked power to interpret or modify it (p. 6); and (2) Dealers was not notified that the Union intended to urge "sandwiching" (p. 5).

As to the first ground, the short answer is that at all prior stages of the case Dealers conceded that the Joint Committee *did* have authority; it told the court below that Dealers felt "bound to honor the * * * decision" (Br. p. 4). It is a little late in the day for Dealers to renege. In point of fact, the Joint Conference Committee (which Dealers erroneously calls "Joint Board"), consists of "duly elected delegates of the Employers (Automobile Transporters Labor Division) and of the Unions (National Truckaway and Driveaway Conference)" (R. 10, fol. 19d-19e). The Division and the Conference *did* negotiate the contract (R. 14). The record shows that the Division is composed of "the national representatives of the automobile transporting companies," who have "power of attorney" to represent and "sign for" Dealers and every other member company (R. 52). The Conference, of course, is the duly authorized representative of its member unions, and, as such, is "the exclusive representative of all employees" in the Truckaway and Driveaway unit (R. 9).

The authority of the Division and the Conference to delegate to their respective representatives on the Joint Committee power finally to resolve questions of contract interpretation (R. 12-13), and controversies arising out of absorptions and mergers (R. 10, fol. 19c), is thus an attribute of their own unquestioned representative status and statutory bargaining authority. Not a scintilla in the record suggests that either the companies or the local unions ever attempted to impose any limitation upon the collective bargain-

ing authority they delegated to the Division and the Conference respectively.

As to the second ground, the short answer is that, having concealed the truth from the Union, Dealers cannot be heard to claim surprise at the Union's reaction to discovery. If "Dealers was unaware * * * that the Union intended to take a position that Dealers' employees and E & L employees were to be sandwiched" (p. 5), the reason is that prior to the hearing Dealers misrepresented the "absorption" facts (R. 47, 57.)[1] Obviously, an employer cannot be allowed to "gain any possible advantage" (II Scott, *Trusts* (2d ed., 1956), § 172, p. 1288), from concealment of facts necessary to the Union's performance of its statutory function of policing compliance with, and participating in administration of, the contract. *International Ass'n. of Mach.* v. *International Air. Serv.*, 302 F. 2d 808, 816 (4th Cir. 1962); *N.L.R.B.* v. *F. W. Woolworth Co.*, 352 U.S. 938 (1956), reversing 235 F. 2d 319 (9th Cir.), setting aside 109 NLRB 196; *J. I. Case Co.* v. *NLRB*, 253 F. 2d 149, 153 (7th Cir. 1958); *NLRB* v. *John S. Swift Co.*, 277 F. 2d 641, 645 (7th Cir. 1960). Concealment violates the "covenant of good faith and fair dealings * * * which must inhere in every collective bargaining contract if it is to serve its institutional purposes." *United Steelworkers* v. *New Park Mining Co.*, 273 F. 2d 352, 356 (10th Cir. 1959); Bogert, *Trusts and Trustees* (2d ed., 1962) § 974, p. 270.

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[1] Respondent Dealers' statement (Br. p. 2) that its employees were told by the Union "that the grievance of E & L's employees would not be considered" is unsupported by any citation to the record and it is factually incorrect. The record shows that the employees were told that, absent "absorption," the grievance would be denied. See our main Brief, p. 45, note 20.

Respondents Moore, et al., would argue (pp. 13-15), that the Committee had no authority because E & L employees lacked standing to file a grievance. But standing to grieve is also a question of interpretation of the contract, and, under federal law, such questions are within the scope of the contracting parties' power to settle by agreement. Respondents' admission (*ibid.*, p. 20) that the decision below entails determination "[w]hat bargaining unit was representing these respondents" carries a death wound. Where, as here, employees of many employers have selected a common bargaining agent and engaged in joint bargaining, they are members of a multi-employer bargaining unit as a matter of federal law. See our main brief, p. 33; Brief for Petitioners in No. 18, pp. 26-28. The fact is that the contract benefits respondents enjoy are not the product of bargaining by Local 89 with Dealers, as respondents would have it, but by the Conference with the Division.

II.

Both respondents persist in ignoring the central fact that seniority clauses affecting future employment are not "terms peculiar in the individual benefit which is their subject matter and which [therefore] * * * give a cause of action to the individual employee * * * [where] the employee and the union are in disagreement * * *." *Employees* v. *Westinghouse Corp.*, 348 U.S. 437, 460, 459 (1955). Rights "which under state law are distributed among the union members," are vested by Section 9(a), 8(d) and 301 "in a legal 'entity' recognized by federal law." *Ibid.*, at 451. Reliance upon Mr. Justice Black's dissent in *Smith* v. *Evening News* overlooks his concurrence with Mr. Justice Douglas in *Westinghouse* (348 U.S. at 467):

> "In short, the union represents the interest of the community of employees in the collective bargaining agreement. The wide range of its interests are envisaged by the Act, which gives the collective bargaining agency exclusive authority to bargain 'in respect to rates of pay, wages, hours of employment, or other conditions of employment.' 29 U.S.C. § 159(a), 29 U.S.C.A. § 159(a). The range of its authority is the range of its interests."

The bargaining agent's interest in and authority over "conventional uses of the seniority system in the process of collective bargaining" (*Aeronautical Lodge* v. *Campbell*, 337 U.S. 521, 526 (1949)), comprehends "such matters as the unit within which seniority is to be computed [and] the privileges to which it shall relate * * *." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 339 (1953).

Respectfully submitted,

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